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No. 00-276

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA AND UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the assessments imposed pursuant to the Mushroom Promotion, Research, and Consumer Information Act of 1990, 7 U.S.C. § 6101, *et seq.*, on members of the mushroom industry for advertising programs designed to support the industry violate the First Amendment.

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INTEREST OF AMICUS CURIAE

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appears in legal proceedings before federal and State courts in cases raising important issues under the First Amendment Free Speech Clause. *See, e.g., Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996); *Keller* v. *State Bar,* 496 U.S. 1 (1990). WLF submits this brief in support of Respondent and with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

Respondent United Foods, Inc. (United) accuses the United States, in effect, of being a bully in the marketplace of ideas. The United States replies that *Wileman* means that "the compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. Interpreted so broadly, *Wileman* directly conflicts with the Court's consistent understanding of compelled speech. If the Court wishes to harmonize *Wileman* with its compelled speech cases, that decision must be give its narrowest possible holding. Such a reading would limit *Wileman* to upholding the compelled funding of expressive activities only when the funding scheme arises in a pervasively regulated context fairly indistinguishable from what the Court identified in *Wileman* itself.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel, made a monetary contribution to the preparation and submission of this brief.

If the Court wishes to reconsider *Wileman*, however, it should adopt strict scrutiny as the constitutional standard for assessing compelled subsidy claims. Government programs compelling private financial support for expressive activities *always* raise constitutional issues, regardless of the subject matter of the expression. It is the essential fact of compulsion, not the accident of subject matter, that makes compelled speech a matter of core First Amendment concern. Given its proximity to core First Amendment principles, a governmentally mandated subsidy should be struck down unless it serves a compelling government interest and is narrowly tailored to avoid unnecessary infringements on free speech.

The Mushroom Act and Order fail the strict scrutiny test. Promoting the consumption of mushrooms does not qualify as a *compelling* government interest. Even if it did, forcing growers to financially support speech with which they disagree is not a narrowly tailored means to that end.

ARGUMENT

I. THE GOVERNMENT'S READING OF *WILEMAN* UNNECESSARILY CONFLICTS WITH THE COURT'S COMPELLED SUBSIDY CASES.

The United States contends that *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997) stands for the following rule: "the compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. This reading of *Wileman* must be rejected. For if adopted,

Wileman will conflict with this Court's decisions sharply constraining the government's power to compel speech or the funding of speech.

The First Amendment declares, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley* v. *Irish-American Gay Group*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 11, 16 (1986) (plurality opinion); *see also West Virginia Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 642 (1943) (striking down a Pennsylvania law requiring school children to recite the Pledge of Allegiance regardless of their religious objections); *Wooley* v. *Maynard,* 430 U.S. 705, 713–15 (1977) (invalidating a New Hampshire law imposing criminal penalties on motorists who fail to display the state motto, "Live Free or Die," on automobile license plates). Indeed, the Court has emphasized that the difference between compelled speech and compelled silence "is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley* v. *National Federation of the Blind,* 487 U.S. 781, 796–97 (1988).

The same principles govern claims challenging the validity of government programs that mandate private financial support for officially approved or authorized expressive activity. *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977) and *Keller* v. *State Bar of*

California, 496 U.S. 1 (1990) are the leading cases on this point.

Abood arose from an "agency shop" arrangement between a public school board and a teachers' union. Teachers who declined to join the union were nonetheless required to pay the union an "agency fee" equal to the dues paid by union members. 431 U.S. at 211. The government justified forcing nonmembers to pay by pointing to its interest in maintaining "labor peace," *id.* at 224, which Congress had determined was directly advanced by a system of exclusive collective bargaining. *See id.* at 220–24.

Under that system a union designated as an exclusive bargaining agent is required to represent all employees within the bargaining unit (including nonmember employees). *Id.* at 221. The Court perceived a free rider problem, however. Nonmembers have a financial incentive "to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees" unless nonmembers could be required to pay for such benefits. *Id.* at 222. Because of the government's interest in preserving "labor peace," *id.* at 224, and the free rider problem that augmented that interest, the Court upheld the imposition of mandatory union fees on nonmembers. *Id.* at 225.

But the Court went on to draw a key distinction between activities "germane" to the government's interest in preserving peaceful labor relations and activities that are not.[2] The Court acknowledged that

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[2] Although courts have occasionally had difficulty in drawing this line with precision, *see Board of Regents* v. *Southworth*, (continued...)

the First Amendment poses no obstacle *per se* to the expenditure of union monies "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 235 (footnote omitted). Using *mandatory* union fees for such purposes is off-limits. A union may constitutionally devote resources to activities not germane to the purpose of maintaining the system of exclusive collective bargaining, the Court said, *only if* "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment." *Id.* at 236.

Animating this distinction, the Court said, was the threat posed by compelled subsidies to core First Amendment concerns:

> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his

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[2] (...continued)
529 U.S. 217, 231–32 (2000), reported decisions have repeatedly emphasized that the *only* government interest that justifies impingement on the First Amendment rights of nonunion employees is the interest in maintaining a system of exclusive bargaining. *See, e.g., Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 520–21 (1991).

> mind and his conscience rather than coerced by the State.

Id. at 234–35.[3]

Keller v. *State Bar of California,* 496 U.S. 1 (1990) applied *Abood*'s constitutional analysis in the context of mandatory dues paid to an integrated State bar association. There the Court found that such compelling the payment of bar dues infringes lawyers' First Amendment rights unless used to "fund activities germane to . . . regulating the legal profession or 'improving the quality of the legal service available to the people of the State.'" *Id.* at 14 (quoting *Lathrop* v. *Donohue,* 367 U.S. 820 (1960)).

Similar to its reasoning *Abood* the Court agreed with the government that "the compelled association and integrated bar are justified by the State's interest in regulating the legal profession and improving the quality of legal services." *Id.* at 13–14. Once again, the Court identified a "free rider" problem that augmented this limited justification for compelling the subsidization of bar-related activities. "It is entirely appropriate that all of the lawyers who derive benefit from the unique status of being among those admitted to practice before the courts should be called upon to pay a fair share of the cost of the professional involvement in this effort." *Id.* at 12.

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[3] The Court has never suggested that a different constitutional analysis obtains depending on whether the compulsion takes the form of government efforts to force individuals to utter specific words (as in *Barnette*) or the form of monetary exactions to finance speech by non-government entities (as in *Keller* and *Abood*).

Yet the Court hastened to add that the First Amendment prohibited the bar association from using such compelled funding for "activities of an ideological nature." *Id.* at 14. Among such forbidden uses for officially compelled funds included "endorse[ment] or advance[ment] [of] a gun control or nuclear weapons freeze initiative," *id.* at 16, activities in which the State Bar of California had already engaged. *Id.* at 15.

Abood, *Keller*, and their progeny thus establish that mandatory government subsidies imposed to fund expressive activity must satisfy exacting First Amendment scrutiny. First, the government must demonstrate that the compulsory financial support serves some heightened government interest. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991) (plurality). Second, the funded activity must be "germane" to the government interest asserted as compelling. *Id.*; *see Keller*, 496 U.S. at 13 ("*Abood* held that a union could not expend a dissenting individual's dues for ideological activities not 'germane' to the purpose for which the compelled association was justified: collective bargaining."). Third, the compulsory funding scheme must be narrowly tailored to serve that compelling interest. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 & n.11 (1986); *Pacific Gas & Electric Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 19 (1986) (plurality). This means the mandatory subsidy at issue must not "significantly add to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality).

These well-settled principles contradict the government's reading of *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997). In that case a group

of California fruit growers challenged regulations issued by the Secretary of Agriculture, which required them to pay for a series of generic advertisements extolling the virtues of peaches, plums, and nectarines. *Id.* at 460–61. The growers argued that the assessments unconstitutionally required them to engage in objectionable speech. However, the Court held in a narrowly divided decision that the regulations at issue there did *not* violate the First Amendment. It reached this conclusion only because the growers "agree[d] with the central message of the speech," and therefore the regulations did not require the growers to "repeat an objectionable message out of their own mouths" or otherwise "compel any person to engage in any actual or symbolic speech." *Id.* at 469–70.

The United States interprets *Wileman* to mean that "compelled funding of expressive activities does not violate the First Amendment so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose." Br. Pet. 16 n.9. If true, *Wileman* stands in direct opposition to *Abood* and *Keller*.

First, the constitutional principles enunciated and applied in *Abood* and *Keller* extend to the compelled funding of *any* speech or expressive activity, not simply to "nonideological" speech. As the Court has observed, "our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protections." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977); *see also Lehnert*, 500 U.S. at 521-522 (plurality) ("First Amendment protection is in no way

limited to controversial topics or emotionally charged issues.").

The capaciousness of *Abood* and *Keller* is a natural outgrowth of their roots in more general compelled speech doctrine. *Wooley* v. *Maynard,* 430 U.S. 705 (1977), for instance, stressed that the First Amendment protects "the right to refrain from speaking *at all*," not only the right to refrain from speaking on political or controversial subjects. *Id.* at 714 (emphasis added). The government's assertion that compelled speech deserves no First Amendment protection merely because the speech is nonideological runs contrary to the Court's decisions.

Second, the government's portrayal of *Wileman* is also out of harmony with *Abood*, *Keller*, and other compelled subsidy cases, because it attempts to dilute the "narrow tailoring" requirement central to this Court's established understanding of the First Amendment. The United States contends that compelled financial support of the expressive activities of private parties should be upheld so long as it is "germane to the statutory or regulatory purpose." Br. Pet. 16 n.9. Framed in such loose terms, the government's standard amounts to little more than rational basis review of compelled speech. Not only does this contradict *Abood*. *See Keller*, 496 U.S. at 13. It runs contrary to this Court's decisions, which leave no doubt that the First Amendment prohibits the government from treating one's right not to speak (or subsidize speech) so cavalierly. *See, e.g.*, *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 (1986).

Consider how the Court's First Amendment landmarks would look under the government's view

of compelled speech. Schoolchildren could be dragooned into reciting the Pledge of Allegiance despite their most heartfelt religious objections. *But see West Virginia Bd. of Education* v. *Barnette,* 319 U.S. 624, 642 (1943). Inculcating a spirit of national unity would appear, even in ordinary times, to qualify as an "important regulatory objective," and compelled recitation of the Pledge of Allegiance is undoubtedly "germane" to that objective. Yet even at the height of World War II, the Court stoutly rejected the notion that fostering national unity ought to override First Amendment concerns. *Id.* at 640–41. It therefore strains credulity to assert, as the government does, that a merely rational basis review—the same standard used to review the economic regulation of opticians, *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955)—adequately protects the core First Amendment concerns implicated when the government marshals its power to coerce the financial support of speech.

All this leaves the Court in something of a quandary. If read according to its broadest language, as the government suggests, *Wileman* will stand in direct conflict with a long line of firmly established compelled speech and compelled subsidy cases. The Court can avoid this conflict by reading *Wileman* according to its narrowest ground of decision instead. That saving interpretation is the one advocated by United Foods, namely that *Wileman* turns on "the comprehensive nature of regulations governing the tree fruit industry and marketplace." Br. Opp. 9. If the Court wishes to reexamine *Wileman*, as the Institute for Justice suggests, *see* Br. Amicus Curiae Institute for Justice, then it will be helpful to review the Court's compelled speech decisions and ask what the First

Amendment demands in compelled subsidy cases, and why. The answer, we think, is simple and compelling: the First Amendment prohibits the government from imposing a mandatory subsidy, unless it passes the test of strict scrutiny.

II. OFFICIALLY COMPELLED SUBSIDIES OF EXPRESSIVE ACTIVITY MUST PASS THE TEST OF STRICT SCRUTINY.

An analysis of why compelled speech and its cousin, the compelled subsidy, merit First Amendment protection properly begins with the contrary position, set out by the United States and its *amici*. They make the sweeping argument that the First Amendment does not reach a government program compelling the financial support of generic advertising. The government would uphold any government-ordered subsidy, even of admittedly expressive activities, "so long as . . . the expressive activities are *either* non-ideological *or* germane to the statutory or regulatory purpose . . . ." Br. Pet. 16 n.9. Amici Curiae American Mushroom Institute, *et al.* (Mushroom Institute) would go further. They assert that "compelled funding of speech raises *no First Amendment issue* unless the speech is political or ideological." Br. *Amici Curiae* American Mushroom Inst. 9 (emphasis added). We respectfully disagree.

Whether "the speech funded by the Mushroom Act is . . . after all, about mushrooms," *id.* at 6, is entirely beside the point. This Court has specifically rejected a subject matter test for evaluating compelled subsidy claims under the First Amendment. "Nothing in the First Amendment or our cases discussing its meaning makes the question whether the adjective 'political' can properly be attached to those beliefs the critical

constitutional inquiry." *Abood*, 431 U.S. at 232. Indeed, the Court has "never suggested that expression about philosophical, social, artistic, *economic*, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to *full* First Amendment protections." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 231 (1977) (emphasis added). Speech about mushrooms is as entitled to constitutional protection as speech about tax reform, the ethics of redistribution, or the novels of P.G. Wodehouse.

Perhaps the government's real objection to United Foods' claim lies not so much with the speech at issue being nonideological, but rather with its being *commercial*. Maybe the government's position rests at bottom on the assumption that commercial speech is "a sort of second-class expression." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring). If this is a fair reading of the government's argument, two answers suggest themselves.

First, one might glibly point out that "commercial speech" is a term of art under the First Amendment. It does not mean "whatever can be expressed in economic terms." Instead the Court has limited its meaning to speech that "propose[s] a commercial transaction." *Board of Trustees* v. *Fox*, 492 U.S. 469, 473 (1989). Fully protected speech—according to *Abood*, this includes speech on economic matters—is not transformed into commercial speech just because it is uttered by a corporation, *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1978), or because the speaker is motivated by a desire for a profit. "Some of our most valued forms of fully protected speech are uttered for a profit." *Fox*, 492 U.S. at 482. In its leading postwar free speech case, for example, the Court

afforded full First Amendment protection to the contents of a paid advertisement soliciting money. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964).

Second, a government order *compelling* speech or the financial support of speech is quite unlike a government order *regulating* speech. The distinction is amply supported by the Court's decisions and is relevant, if not controlling, in deciding the question presented. To see that distinction in sharper relief, it will be helpful to briefly review this Court's commercial speech jurisprudence.

It lies beyond dispute that the First Amendment safeguards the public's interest in "the free flow of commercial information." *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976). While emphasizing that a government ban on advertisements may violate the First Amendment, *id.* 773, at the Court added that the Constitution "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Id.* at 772. Regulations may validly require that commercial advertisements "appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent [their] being deceptive." *Id.* at 772 n.24. In a later case the Court explained that, to merit constitutional protection, commercial speech "must concern lawful activity and not be misleading." *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

To eliminate potential deception, the government may impose mandatory disclaimer requirements on

commercial advertising. *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) sustained an Ohio rule requiring lawyers whose advertisements are potentially misleading to include warnings or disclaimers in the advertisements in order to "dissipate the possibility of consumer confusion or deception." *Id.* at 651. However, the Court has firmly distinguished between a mandatory disclaimer and compelled speech. "Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or expressly contrary to the corporation's views." *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1, 15 n.12 (1986) (plurality opinion).

Based on these principles the Court has laid down a proverbial three-part test: the government may regulate commercial speech only if (1) the governmental interest underlying the regulation is "substantial," (2) the "regulation directly advances the governmental interest asserted," and (3) the regulation "is not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. Since laying down this test in *Central Hudson* the Court has applied it in a wide variety of cases challenging restrictions on commercial speech. *See, e.g., Greater New Orleans Broad. Ass'n, Inc.* v. *United States*, 527 U.S. 173 (1999) (striking down a federal ban on broadcast advertising for casinos); *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (invalidating a state statute that prohibited liquor stores from advertising the prices of their products); *Rubin* v. *Coors Brewing Co.*, 514 U.S. 476 (1995) (invalidating a regulation prohibiting beer labels from displaying alcohol content); *Edenfield*

v. *Fane*, 507 U.S. 761 (1993) (invalidating a regulation forbidding accountants from directly soliciting prospective clients).

But the Court has never applied *Central Hudson*, a test devised for the *regulation* of commercial speech, to review government actions *compelling* an individual or a business entity to engage in speech where, as here, such compelled speech is not necessary to prevent a company's own advertising from being deceptive. And with good reason.

The Court has expressed two justifications for affording the government more leeway in its regulation of commercial speech: (1) "the greater 'objectivity' of commercial speech justifies affording the State more freedom to distinguish false advertisements from true ones;" and (2) "the greater 'hardiness' of commercial speech, inspired as it is by the profit motive, likely diminishes the chilling effect that may attend its regulation." *44 Liquormart, Inc.* v. *Rhode Island,* 517 U.S. 484, 499 (1996) (plurality opinion). Neither has any relevance to government efforts to *compel* speech.

First, government compulsion of speech cannot logically advance the government's interest in preventing the dissemination of false advertising. The only speech at issue is compelled by the government. It follows that the compulsion can never be said to serve the purpose of preventing the dissemination of false or misleading statements.

Second, compelled commercial speech is no hardier than other forms of compelled speech. In one sense, all forms of compelled speech are extremely 'hardy' since they are backed by the force of law. Moreover, a chilling effect on voluntary speech is not one of the

dangers of compelled speech, whether commercial or noncommercial.

On reflection, it makes no sense to think of compelled subsidies in these terms. Treating the compelled financial support of speech about a commercial topic like "commercial speech" therefore turns out to be a category mistake.

> Although the State may at times "prescribe what shall be orthodox in commercial advertising" by requiring the dissemination of "purely factual and uncontroversial information," . . . outside that context it may not compel affirmance of a belief with which the speaker disagrees . . . . Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, . . . subject, perhaps to the permissive law of defamation. . . . Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.

Hurley v. *Irish-American Gay Group*, 515 U.S. 557, 573–74 (1995) (citations omitted).

Even apart from *Abood*, *Keller*, and their progeny, the Court has left no question that these principles equally apply to speech on the subject of commerce.

In *Pacific Gas & Elec. Co.* v. *Public Util. Comm'n*, 475 U.S. 1 (1986) (plurality opinion), a privately owned utility company challenged a regulatory order requiring it to "include in its billing envelopes speech of a third party with which the utility disagrees." *Id.* at 4. Despite the fact that the utility company's billing statements had to do with commerce, the Court applied strict scrutiny, rather than the more relaxed *Central Hudson* standard, and concluded that the order was unconstitutional because it was "not a narrowly tailored means of furthering a compelling state interest." *Id.* at 21; *see also Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (holding that the First Amendment bars the government from compelling a newspaper to provide a sounding board for views other than its own).

With these decisions and their animating principles in view, it becomes crystal clear that the government and its *amici* are mistaken in their assertion that a compelled subsidy lies outside the ambit of First Amendment protection "unless the speech is political or ideological." Br. Amici Curiae American Mushroom Inst. 9; *see* Br. Pet. 16 n.9. It is the essential fact of government compulsion, not the accident of subject matter, that determines whether speech merits First Amendment protection.

A contrary interpretation of the First Amendment would lead to bizarre results. Regulation of commercial speech would proceed only if it satisfied the *Central Hudson* test, *see* 447 U.S. at 566, while governmentally compelled speech would receive no constitutional protection at all. Also, the government's position would relegate "compelled speech on a commercial topic" to the constitutional underworld of unprotected

speech, alongside obscenity and fighting words. *See Roth* v. *United States*, 354 U.S. 476 (1957) (obscenity); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942) (fighting words). Nothing in the text of the First Amendment or this Court's gloss on it supports such a result.

Next, the Mushroom Institute insists that "[a] compelled funding claim is thus far removed from the center of what the First Amendment prohibits." Br. Mushroom Inst. 10. On the contrary. As the Court acknowledged in *Abood*, a compelled funding claim like United Foods' implicates concerns "at the *heart* of the First Amendment." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 234–35 (1977) (emphasis added). In *Abood*, for instance, the Court regarded forced contributions for purposes not germane to the maintenance of an exclusive bargaining system as profoundly violative of core First Amendment principles. *See id.* at 235.

The government's interpretation of the First Amendment, which would permit the government to compel financial support for any "nonideological" speech, must therefore be rejected. There remains the problem of identifying the correct rule of decision. If not the government's position, then what?

One aspect of the *Abood-Keller* test recently posed difficulties for the Court in *Board of Regents* v. *Southworth*, 529 U.S. 217 (2000). At issue there was "a First Amendment challenge to a mandatory student activity fee imposed" by the University of Wisconsin. *Id.* at 221. Certain students "contended that the University must grant them the choice not to fund those [student groups] that engage in political and

ideological expression offensive to their personal beliefs." *Id.* at 227.

As the Court readily acknowledged, *Abood* and *Keller* dictated that "students who attend the University cannot be required to pay subsidies for the speech of other students without *some* First Amendment protection." *Id.* at 231 (emphasis added). However, because "it is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning," *id.* at 232, the Court shied away from applying these decisions. Finding *Abood* and *Keller* "neither applicable nor workable in the context of extracurricular speech at a university," *id.* at 230, the Court turned to its public forum decisions, which it thought "instructive here by close analogy." *Id.* at 229–30. From these the Court drew the conclusion that the First Amendment rights of objecting students were adequately protected by "the requirement of viewpoint neutrality in the allocation of funding support." *Id.* at 233. Accordingly, the Court held that the University of Wisconsin could compel all students to financially support student organizations, so long as it adhered to the principle of viewpoint neutrality in distributing funds. *Id.* at 233–34.

Southworth injected considerable uncertainty into compelled speech doctrine by leaning on public forum analysis. *See The Supreme Court, 1999 Term—Leading Cases*, 114 Harv. L. Rev. 279, 285 (2000) (calling the public forum metaphor "a conceptually troubled categorical tool"). This is most clearly seen by comparing the constitutional claim pressed by the students with the Court's holding. The students pressed a claim to be exempt from funding the

university's objectionable speech, just as the claimants in *Abood* and *Keller* had done. *See id.* at 227. However, the Court "substitut[ed] equality for freedom of conscience," 114 Harv. L. Rev. at 287, by answering a compelled speech claim with the doctrinal non sequitur of viewpoint neutrality. *See id.* at 233-34.

In our opinion, this incongruency between claim and relief in *Southworth* can be explained by the Court's unwillingness (or inability) to apply a "germaneness" test to a public university. The Court itself conceded as much. "If it is difficult to define germane speech with ease or precision where a union or bar association is the party, the standard becomes all the more unmanageable in the public university setting, particularly where the State undertakes to stimulate the whole universe of speech and ideas." *Id.* at 232. Determining whether a particular activity is "germane" to the university's compelling interest in imposing a mandatory student fee would have required the Court to articulate a baseline purpose from which departures (at some unspecified point) constitute a First Amendment violation. *See Abood* v. *Detroit Board of Education,* 431 U.S. 209, 235–36 (1977); *Keller* v. *State Bar of California,* 496 U.S. 1, 13–14 (1990).

Because the Court was reluctant to identify a single "core" purpose served by a state university—doing so would have been tantamount to telling the university how to do its job—the Court faced a dilemma. The kind of factual analogies on which the Court had previously relied, *see Keller*, 496 U.S. at 12, broke down in *Southworth*. That case arose in an institutional setting wholly unlike unions and bar associations, which had given rise to the compelled subsidy cases in the first place, and the Court evidently regarded

the *Abood-Keller* test in this setting as a procrustean bed. At the same time, refusing to apply that test left the students' compelled subsidy claim without a satisfactory resolution.

Southworth thus revealed a defect in the *Abood-Keller* test. Inquiring whether compelled monies are devoted to "ideological activities not 'germane' to the purpose for which the compelled association was justified," *Keller* v. *State Bar*, 496 U.S. 1, 13 (1990), may appear natural when limited to unions, State bar associations, and other institutions that serve a single purpose justifying compelled association. However, as *Southworth* amply demonstrates, the germaneness inquiry becomes a distraction when applied to institutions for which such a single purpose cannot be fairly identified.

Viewpoint discrimination supplies only a makeshift solution. At best, it avoids a doctrinal problem of the Court's own making. At worst, it generates decisions that "appear unprincipled." 114 Harv. L. Rev. at 287.

Nor can the Court simply abandon the field. The Court's decisions interpreting the First Amendment leave no doubt that compelled subsidies raise grave constitutional concerns. *See, e.g.*, *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977); *Keller*, 496 U.S. at 9–10.

The better solution lies with a bit of doctrinal editing. As currently conceived, *Abood-Keller* comprises a three-part test. First, the government must demonstrate that the compulsory financial support serves some heightened government interest. *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991) (plurality). Second, the funded activity must be

"germane" to the government interest asserted as compelling. *Keller*, 496 U.S. at 13. Third, the compulsory funding scheme must be narrowly tailored to serve that compelling interest. *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 & n.11 (1986). Because the troubles stem from the second element of the test, it ought to be scrapped. The resulting test would have only two elements: proof of heightened government interest and the requirement of narrow tailoring. In other words, the *Abood-Keller* test ought to be replaced with strict scrutiny. Doing so would carry several advantages.

First, strict scrutiny fairly describes the level of judicial scrutiny applied in prior decisions. The Court has used different terms to describe the showing required of the government in demonstrating the importance of its challenged policy interest. While *Abood* itself was silent on the question, subsequent cases have required the government to identify an interest that is "vital," *Lehnert* v. *Ferris Faculty Ass'n*, 500 U.S. 506, 519 (1991), or "compelling." *Chicago Teachers Union* v. *Hudson*, 475 U.S. 292, 303 n. 11 (1986). Whatever the precise verbal formulation, these decisions establish that the government bears an extremely heavy burden when it seeks to defend a program compelling the financial support of speech. Requiring the government to defend a compelled subsidy by producing a "compelling interest" thus finds sturdy precedential support.

Requiring the government to show that a compelled subsidy program is "carefully tailored to minimize the infringement," *id.* at 303, of free speech is likewise established by this Court's decisions. *Id.* at 303 n.11. Such an inquiry into the tailoring of means to ends

will allow the Court to assess the need for employing compulsory funding as a statutory or regulatory tool while avoiding the difficulties posed by asking whether a particular expenditure is "germane" to a compelling interest. In short, prior decisions point the way toward adopting strict scrutiny as the correct standard in compelled subsidy cases.[4]

Second, strict scrutiny rationalizes First Amendment jurisprudence. Not only does it make compelled speech doctrine internally consistent by laying subsidy cases like *Abood* and *Keller* on the same principled foundation as compelled speech cases like *Barnette* and *Wooley*. It also supplies a persuasive explanatory principle for reconciling the entire line of compelled subsidy cases, including spelling out the decisive distinction between *Machinists* v. *Street*, 367 U.S. 740 (1961) and *Abood*, or *Lathrop* v. *Donohue*, 367 U.S. 820 (1960) and *Keller*. A close reading of these decisions through the lens of strict scrutiny illuminates why the programs in *Street* and *Lathrop* were upheld and those in *Abood* and *Keller* were not. The government has a compelling interest in preserving the collective bargaining system and the integrated bar. *See Street*, 367 U.S. at 760–61; *Lathrop*, 367 U.S. at

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[4] One might object that applying strict scrutiny to compelled subsidies overlooks the "free rider" problem, on which this Court partly relied to uphold the exclusive bargaining system and the integrated bar. *See Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 222 (1977); *Keller* v. *State Bar of Cal.*, 496 U.S. 1, 12 (1990). However, the "free rider" problem does not represent an independent justification for compelling the financial support of speech. It only supplies a reason for concluding that such a program, when it serves a compelling interest, is narrowly tailored because allowing a free speech exemption would fatally undermine the program.

238. On the other hand, using mandatory dues for purposes not closely related to these ends fails the test of narrow tailoring. *See Abood*, 431 U.S. at 232, 235; *Keller*, 496 U.S. at 13–14.

Keller and *Abood* can thus be viewed as exercises in strict scrutiny. Certainly it is reasonable to say that the purposes found to justify compulsory speech in these cases—promoting industrial peace by preserving the system of collective bargaining and preserving the benefits of an integrated bar—qualify as compelling government interests. Moreover, the decisions make accentuate the point that spending money obtained through compulsion for purposes far removed from these central ends fails strict scrutiny, if only because such expenditures are not narrowly tailored.

Third, strict scrutiny avoids the difficulties posed by the germaneness test. Take *Southworth*, for instance. Applying strict scrutiny there would have allowed the Court to reach the same result while avoiding a Hobson's choice. The Court could have explained that the University of Wisconsin had identified a compelling interest in educating its students. On this point there could be little dispute. The salient questions would then focus on whether the compulsory student fee was narrowly tailored to the university's asserted interest. A reasonable answer would be for the Court to find that the university's program was narrowly tailored because a free rider problem threatened to undermine its entire student organization system, much as the free rider problem faced in *Abood* and *Keller*. In short, applying the strict scrutiny test would have enabled the Court in *Southworth* to resolve the objecting students' compelled subsidy claims without having to tell the university

what its "core" purposes are or shifting from a freedom-oriented claim to an equality-oriented remedy.

Fourth, strict scrutiny furnishes a universally-applicable, familiar, and workable rule of decision. Unlike the germaneness test, *see Keller*, 496 U.S. at 12, strict scrutiny does not depend on finding similarities between the institution from which a compelled subsidy arises and a labor union or bar association. It is therefore not so fact-dependant that it prevents the Court from fully vindicating the free speech claims brought in factual contexts far afield from labor unions and State bar associations.

For all these reasons, the Court should adopt strict scrutiny as the constitutional standard for assessing compelled subsidy cases. The rule would then be that the government may compel speech or financial support for speech *only if* it can demonstrate that its purpose for doing so is compelling *and* the means it has chosen are narrowly tailored to that end.

III. THE MUSHROOM ACT AND ORDER INFRINGE RESPONDENT'S RIGHTS UNDER THE FIRST AMENDMENT.

At issue here is indisputably a government order compelling United Foods to support speech with which it disagrees. The compulsion is unmistakable. The Mushroom Council, a creature of federal law, imposes an annual assessment on every grower and importer of mushrooms for the "fresh" market whose volume equals 500,000 pounds. 7 U.S.C. § 6102(9), 7 C.F.R. §§ 1209.11, .51, .52. Failure to comply with this annual assessment carries civil penalties up to $5,500. 7 C.F.R. § 3.91(b)(xxix).

United Foods objects to the Mushroom Act and Order for two reasons. First, it finds that a "generic, nationwide approach to promoting mushrooms . . . undermine[s] [its] effort to differentiate its Pictsweet brand from competitors, as well as its effort to tailor marketing to local retail conditions." Br. Opp. 4. Second, United Foods objects to advertising that "associate[s] mushrooms with consumption of alcohol and . . . tout[s] mushrooms as an aphrodisiac." *Id.*

Under the First Amendment the government may compel speech or financial support for speech only if it can demonstrate that its purpose for doing so is compelling and the means it has chosen are narrowly tailored to that end. The Mushroom Act and Order fail on both accounts.

The government's interest in promoting the consumption of mushrooms is not compelling. As *Amici* Mushroom Institute, *et al.* so aptly put it, the speech at issue in this case "is, after all, about mushrooms." Br. Amici Curiae Mushroom Institute, *et al.* Promoting mushrooms, however important to the national economy, *see* 7 U.S.C. § 6101(b), cannot be objectively placed on a par with other government interests previously deemed by this Court to be compelling. *See, e.g.*, *American Party* v. *White*, 415 U.S. 767, 783 n.14 (1974) (maintaining "the integrity of the electoral process"); *Snepp* v. *United States*, 444 U.S. 507, 509, n.3 (1980) (preserving "the secrecy of information important to our national security").

Even if the government's interest were thought compelling, the Mushroom Act and Order are not narrowly tailored to serve that interest. In this instance the compelled subsidy "significantly add[s]

to the burdening of free speech that is inherent in the allowance" of any amount of compulsory funding of expressive activity. *Lehnert*, 500 U.S. at 519 (plurality). Alternative means of supporting the generic marketing of mushrooms are available. Tax monies might be allocated for that purpose. Or the government might leave growers free to associate in voluntary cooperatives. *See* Br. Amicus Curiae Sun-Maid Growers, No. 95-1184 , 1995 U.S. Briefs LEXIS 1184 (arguing that voluntary cooperatives offer the advantages of scale without the costs of government compulsion). In short, if a marketing order requiring the largest mushroom growers in the country to fund generic advertising regardless of their individual views and interests qualifies as narrowly tailored, then "narrow tailoring must refer not to the standards of Versace, but to those of Omar the tentmaker." *Colorado* v. *Hill*, 530 U.S. 703; 120 S. Ct. 2480, 2507 (2000) (Scalia, J., dissenting).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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